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In the Supreme Court of the United States

OCTOBER TERM, 1979

PAUL LABRIOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1979. A petition for rehearing was denied on October 25, 1979 (Pet. Apps. C-1 and C-2). The petition for a writ of certiorari was filed on November 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the circumstances of this case, petitioner was denied his right to a speedy trial under the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) and the Eastern District Plan for Prompt Disposition of Criminal Cases.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of New York upon his guilty plea to one count of forging United States Savings Bonds, in violation of 18 U.S.C. 495. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. In an indictment filed in the district court on March 29, 1976, petitioner and three others were charged with 38 counts of forging and uttering forged United States Savings Bonds, in violation of 18 U.S.C. 495. At arraignment, on March 30, 1976, the government announced its readiness for trial (Mar. 30, 1976 Tr. 11). Prior to trial, petitioner moved to dismiss the indictment on the ground that he had been removed from state custody pursuant to a writ of habeas corpus ad prosequendum for arraignment on the indictment, and returned from federal to state custody without having first been tried on the federal charges, in alleged violation of Article IV(e) of the Interstate Agreement on Detainers Act. In his motion, petitioner relied on *United States* v. *Mauro*, 414 F. Supp. 358 (E.D. N.Y. 1976), in which a different judge in the same district had recently decided a similar motion against the government.

At the hearing on the motion, the government indicated that an appeal would be pursued in *Mauro*

(May 12, 1976 Tr. 13-14). The district court, expressing the view that *Mauro* had been incorrectly decided, indicated that it was disposed to deny petitioner's motion and proceed with the trial (*id.* at 6). Rather than go forward with a lengthy and costly trial when the legal issue remained unresolved, petitioner agreed to an indefinite postponement of the trial pending a decision by the court of appeals in *Mauro*; at the same time he expressly waived his speedy trial right (*id.* at 13-17).

On October 26, 1976, the Second Circuit affirmed the district court's decision in *Mauro*. 544 F. 2d 588. On November 1, 1976, petitioner filed a *pro se* motion to dismiss the indictment based, *inter alia*, on the government's failure to prosecute (A. 39).[1] At a status conference on November 12, the government reiterated its readiness to proceed to trial (Nov. 12, 1976 Tr. 4). Petitioner's case was adjourned, without objection from defense counsel, pending the filing and disposition of the government's petition for rehearing en banc in *Mauro* (*id.* at 3, 6, 9). The government's petition in *Mauro* was denied on March 15, 1977, and on June 28, 1977, the district court, relying on *Mauro*, dismissed the instant indictment. The court of appeals affirmed. *United States* v. *Labriola*, 573 F. 2d 1298 (2d Cir. 1977).

On October 3, 1977, this Court granted the government's petition for a writ of certiorari in *Mauro*. 434 U.S. 816. On March 13, 1978, the government filed a timely petition for a writ of certiorari in *Labriola*, requesting the Court to dispose of the petition as appropriate in light of its decision in *Mauro*. Following this Court's decision reversing the judgment of the court

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[1] "A." refers to the appendix in the court of appeals.

of appeals in *Mauro* (436 U.S. 340), the Court, on June 5, 1978, remanded petitioner's case to the court of appeals for further consideration in light of *Mauro*. 436 U.S. 942. Thereafter, on July 24, 1978, the court of appeals reinstated the instant indictment and, on September 29, 1978, denied petitioner's application for rehearing en banc.

2. On October 12, 1978, the mandate from the court of appeals reversing the district court's dismissal order and remanding the case for trial was filed with the district court. However, neither the court nor the parties were informed until January 1979 that the mandate had been received. In the interim, petitioner obtained two adjournments for the purpose of revising and submitting pretrial motions (A. 105-109). On December 11, 1978, petitioner filed a revised motion to dismiss the indictment on speedy trial grounds, alleging violations of the Speedy Trial Act (18 U.S.C. 3161 *et seq.*) and the Eastern District Plan for Prompt Disposition of Criminal Cases ("the Eastern District Plan") (A. 55-102). On January 23, 1979, he sought dismissal on the additional ground that he had not been tried within 60 days of the issuance of the mandate, in alleged violation of Section 5(b) of the Eastern District Plan (A. 103-104). The district court denied the motion to dismiss (Pet. App. B). On February 15, 1979, petitioner pleaded guilty (A. 15).[2]

The court of appeals affirmed (Pet. App. A), concluding that the district court did not abuse its discretion in postponing decision on petitioner's motion to dismiss the indictment pending disposition of the government's petition for rehearing en banc in *Mauro*. It

[2]Under the terms of his guilty plea, petitioner reserved the right to appeal the district court's speedy trial rulings.

further concluded that the adjournments after October 1978 to ascertain the status of petitioner's speedy trial motion and to afford petitioner an opportunity to prepare a revised motion were likewise not an abuse of discretion. Accordingly, it held that the periods of pretrial delay did not warrant dismissal of the indictment under either the Speedy Trial Act or the Eastern District Plan.

ARGUMENT

Petitioner argues (Pet. 7-24) that his rights under the Speedy Trial Act and the Eastern District Plan were violated by the delays between November 1, 1976, and dismissal of the indictment on June 28, 1977, and between October 12, 1978, and entry of his plea of guilty on February 15, 1979. In advancing these arguments, petitioner overlooks the fact that at the time of the district court proceedings in this case, neither the Act nor the Plan provided sanctions for non-compliance with the time limits, other than the Plan's sanction of dismissal for the government's failure to be ready for trial. Section 10(c) and (e) of the Plan; cf. 18 U.S.C. 3163(c). Here, the government announced its readiness for trial at petitioner's arraignment; it remained ready in November 1976, following the court of appeals' decision in *Mauro*, and in October 1978, after petitioner's indictment had been reinstated. In any event, petitioner's claims under the Speedy Trial Act and the Eastern District Plan are without merit.[3]

[3]It is not clear whether petitioner also contends that his Sixth Amendment right to a speedy trial was violated by the pretrial delay. We note that petitioner failed to raise any constitutional speedy trial claim in the courts below; he should not be permitted to raise such a claim for the first time in this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, under

1. Under the Speedy Trial Act and the Eastern District Plan, trial should have commenced within 180 days of arraignment, minus excludable time. 18 U.S.C. 3161(g); Section 5(a)(1) of the Plan. Petitioner apparently concedes that it was proper to exclude the delay between May 12, 1976, when he waived his speedy trial right pending the court of appeals' decision in *Mauro*, and November 1, 1976, when he filed a *pro se* motion to dismiss for failure to prosecute. He argues, however, that the time limits prescribed by the Act and the Plan began to run on November 1, 1976, when he allegedly withdrew his speedy trial waiver.[4]

Petitioner's argument assumes that the entire period between November 1, 1976, and dismissal of the indictment (based on the court of appeals' decision in *Mauro*) on June 28, 1977, must be counted in calculating the extent of pretrial delay. Contrary to this assumption, however, the bulk of this period is properly excludable regardless of whether petitioner's earlier waiver remained in effect. The initial period until November 12, 1976, is

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the balancing test adopted by this Court in *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972), the delay in this case was not unduly lengthy, much of the delay is attributable to the district court's consideration of petitioner's motion to dismiss the indictment on erroneous grounds, and petitioner has not shown that he was significantly prejudiced by the delay (see page 9 and note 6, *infra*).

[4]The November 1 motion to dismiss for failure to prosecute was patently frivolous at the time it was filed, since petitioner had without question waived any claim of a speedy trial violation until that time. Petitioner nonetheless suggests that the motion must be interpreted as a specific withdrawal of that waiver. We note, however, that the claim raised in petitioner's November 1 *pro se* motion was not pursued further by counsel in subsequent motions or hearings. Thus, it is not at all clear, as petitioner alleges, that he revoked the waiver of his right to speedy trial at that time.

explained by the prior scheduling of the next status conference. The subsequent period until March 1977, is attributable to the district court's desire to await a final decision from the court of appeals in *Mauro*. The final period complained of, until June 28, 1977, was mainly devoted to briefing, argument and decision on the motion to dismiss for violation of the Agreement on Detainers.

These periods, or at least a substantial portion of them, are excludable as periods of delay resulting from proceedings concerning the defendant (18 U.S.C. 3161(h)(1)(F), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328, and Section 9(a)(1) of the Plan), and for continuances granted by the court on its own motion on the basis of a finding that the ends of justice would be served (18 U.S.C. 3161(h)(8)(A) and Section 9(a)(8)(A) of the Plan). Here, the district court's decision to await disposition of the government's petition for rehearing en banc in *Mauro* was a reasonable measure designed to avoid a possibly unnecessary interlocutory appeal, which the government surely would have taken if the indictment had been dismissed earlier. Such an appeal would have generated excludable time in any event, pursuant to 18 U.S.C. 3161(h)(1)(E), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328, and Section 9(a)(1)(D) of the Plan. Moreover, the ultimate result of an earlier dismissal would not have altered the outcome – the dismissal would have been affirmed by the court of appeals, the government would have petitioned for certiorari, the case would have been remanded by this Court in light of its decision in *Mauro*, and the indictment against petitioner would have been reinstated.

2. Petitioner also complains that the district court failed to try him within 60 days after the mandate of the court of appeals issued on October 12, 1978. Here, too, it is clear that petitioner entered his guilty plea within

the time limits of the Speedy Trial Act and the Eastern District Plan, once allowance is made for excludable delay.

Although the parties and the court were unaware on November 6, 1978, that the mandate had previously issued, petitioner nonetheless requested and received time to file revised pretrial motions. The motions were filed on December 11, 1978, argued on January 23, 1979, and denied on February 8, 1979. This time period is excludable. 18 U.S.C. 3161(h)(1)(F) and (J), as amended by Pub. L. No. 96-43, Section 4, 93 Stat. 328; Section 9(a)(1)(G) of the Plan. The remaining period before the entry of petitioner's guilty plea was less than the sixty days within which retrial must commence.[5]

Furthermore, 18 U.S.C. 3161(e) and Section 5(b) of the Plan provided that the trial court may extend the period for retrial for as long as 180 days if "factors resulting from passage of time shall make trial within sixty days impractical." Prior to the time the case was dismissed by the district court on June 28, 1977, petitioner had filed several pretrial motions which he later contended had never been decided. Because of the passage of time, it was not clear which of these motions petitioner still wished to pursue after the indictment was reinstated (Nov. 6, 1978 Tr. 3-4). An extension of the sixty day period was therefore proper and permissible under the rules.

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[5]We have assumed, for purposes of this discussion, that the retrial provisions of Section 3161(e) of the Act and Section 5(b) of the Plan apply to the period following reinstatement of the indictment. Actually, these provisions refer only to retrials.

Finally, petitioner contends (Pet. 21-24) that the pretrial delay in this case made it impossible for him to serve his sentence concurrently with another sentence he had been serving. But petitioner himself concedes (Pet. 21) that he was released from confinement on the earlier sentence in May 1978, before the instant indictment was reinstated. Thus, petitioner, who moved to dismiss the indictment for an alleged violation of the Agreement on Detainers, is himself responsible for the major portion of the delay and the resulting impossibility of serving concurrent sentences.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Petitioner's contention that the sentence itself is unfair in light of his asserted rehabilitation may be properly addressed to the district court in a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35. We note that petitioner fails to substantiate his claim (Pet. 22) that while serving the earlier sentence he suffered disabilities as the result of the pendency of the instant indictment.

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